



Paper No. 6

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COPY MAILED

AUG 29 2002

In re Application of
Tremblay & Tremblay
Application No. 09/702,957
Filed: October 31, 2000
Attorney Docket No. 00007-001
For: APPARATUS AND METHOD FOR
ASSISTING MECHANICS WITH THE
REMOVAL AND REPLACEMENT OF BRAKE
DRUMS

OFFICE OF PETITIONS
ON PETITION

This is a decision on the petition requesting revival of the above-identified application. Because the required petition fee (either \$55.00 for a petition under 37 CFR 1.137(a) or \$640.00 for a petition under 37 CFR 1.137(b)) was not submitted with the instant petition, it can only be treated under 37 CFR 1.181 as a petition to withdraw the holding of abandonment.

The petition under 37 CFR 1.181 is **DISMISSED**.

Any petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137(a)." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to timely submit a reply to the restriction requirement, mailed September 6, 2001, which set a one month period for reply. Accordingly, the above-identified application became abandoned on October 7, 2001. A Notice of Abandonment was mailed on May 6, 2002.

PETITION TO WITHDRAW THE HOLDING OF ABANDONMENT

An allegation that an Office action was not received may be considered as a petition for the withdrawal of the holding of abandonment. If the allegation is adequately supported, the petition may be granted and a new Office action mailed. The showing required to establish nonreceipt of an Office communication must include:

1. A statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received.
2. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.¹

A review of the record indicates no irregularity in the mailing of the September 6, 2001

¹ See notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

Restriction Requirement, and in the absence of any irregularity there is a strong presumption that the communication was properly mailed to the applicant at the correspondence address of record. This presumption may be overcome by a showing that the aforementioned communications were not in fact received.

The showing in the instant petition is not sufficient to withdraw the holding of abandonment because (1) applicants did not include a statement that a thorough search of the file jacket and docket records was conducted and (2) applicants did not include a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed.

Petitioners must state that the Office communication was not received and that they searched the place where they normally would keep such communications and couldn't find it. Petitioners must explain their system for keeping track of patent matters -- where they keep the correspondence (Do petitioners have a file/ some means of organization where they keep correspondence pertaining to this application?); where they write down due dates (This need not be a log. This may be in the form of a calendar or a date book); how they know replies are due; etc. In essence, Petitioners must explain how they remind themselves of response due dates and show that the due date for the Restriction Requirement was not entered into that system. The Office would like to see documentary evidence and records as may exist which would substantiate that Petitioners exercised due diligence with respect to their most important business.

Since Petitioners state that they did not receive the Restriction Requirement of September 6, 2001, a copy is enclosed.

ALTERNATIVE VENUES

If petitioners are unable to prove that they did not receive the Restriction Requirement, petitioners can pursue one of the following two options.

(1) Petitioners may wish to file a petition under 37 CFR 1.137(a) -- the unavoidable standard.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by (1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof; (2) the petition fee as set forth in § 1.17(l) -- \$55.00; (3) a **showing** to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in § 1.20 (d)) required pursuant to paragraph (c) of this section.

Documentary evidence is the key to proving unavoidable delay.

(2) Petitioners may wish to file a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the \$640.00 petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

If petitioners are going to file either type of petition to revive, the only permissible reply would be a response to the September 6, 2001 Restriction Requirement.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Assistant Commissioner for Patents
Box DAC
Washington, D.C. 20231

By facsimile: (703) 308-6916
Attn: Office of Petitions

By hand: Office of Petitions
2201 South Clark Place
Crystal Plaza 4, Suite 3C23
Arlington, VA 22202

Telephone inquiries concerning this decision should be directed to the undersigned at (703) 308-6712.



E. Shirene Willis
Senior Petitions Attorney
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

Enclosures: Restriction Requirement, mailed June 6, 2001

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PATENT ABANDONED UNINTENTIONALLY UNDER 37 CFR 1.137(b)

blank PTO/SB/61 -- PETITION FOR REVIVAL OF AN APPLICATION FOR
PATENT ABANDONED UNAVOIDABLY UNDER 37 CFR 1.137(a)

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